


Barry J. Kearney
March 26, 2013
Page 6

allegations.² Unlike the cases cited by the agency, there was no direct implication of the Act in the form of a threat or denial of access to property or denial of a job. Rather, posing as a journalist, an action (b) (6), (b) (7)(C) took all on (b) (6), (b) (7)(C) own, (b) (6), (b) (7)(C) spoke to (b) (6), (b) (7)(C) for a few brief moments about working conditions at a warehouse that (b) (6), (b) (7)(C) wasn't even employed at during the discussion. (b) (6), (b) (7)(C) destroyed the recording (b) (6), (b) (7)(C) made and did not tell anyone about the discussion.³ Once it became known what happened, the Charging Party and (b) (6), (b) (7)(C) seized on the event to publicize it for their own benefits. (b) (6), (b) (7)(C) was immediately fired and both Charged Parties apologized in detailed statements to the press. There simply was no coercive element to the discussion.⁴

As we noted during the videoconference, we take issue with any notion that Wal-Mart's employees might somehow have been affected by these events. It simply is not reasonable to assume that actual Wal-Mart employees (as opposed to non-employees, like (b) (6), (b) (7)(C)), who were not present at the press conference would feel coerced by (b) (6), (b) (7)(C)'s actions. Indeed, there is not a shred of evidence to suggest that any actual Wal-Mart employee has ever become aware of this event. It simply is not a reasonable to conclude that after (b) (6), (b) (7)(C)'s actions became public (due to the Charging Party's extensive, albeit largely inaccurate reporting) that actual employees would somehow feel coerced by proxy. Such a conclusion cannot be reasonably drawn from the facts or any existing precedent.

Again, thank you so much for the opportunity to speak with you. It was, as always, a pleasure to see you. Of course, should you have any additional questions or require additional information, please do not hesitate to contact me.

Very truly yours,



Mark Theodore

² During the videoconference there was some mention that Wal-Mart is "well known" to be "anti-union." Respectfully, such notions are not evidence of anything, much less a violation of the Act. The context of this case is a short period at a press conference, and involved actions by a low-level employee who clearly exceeded (b) (6), (b) (7)(C)'s authority. To extrapolate this minor episode as part of a some generalized context is simply not sustainable.

³ As noted during the videoconference, (b) (6), (b) (7)(C) reported what (b) (6), (b) (7)(C) was sent to report: the identity of the media outlets and what generally was said at the press conference.

⁴ That no coercive element exists is reinforced by the fact Charging Party changed its story about who (b) (6), (b) (7)(C) claimed to be. The reasons for this shift in stories underscores the lack of coercive nature. The Charging Party tried to make (b) (6), (b) (7)(C)'s actions seem more insidious by changing its assertion about the misrepresentation (b) (6), (b) (7)(C) made from "journalist" to "student." This change, of course, flies in the face of the scores of statements the Charging Party, and (b) (6), (b) (7)(C), made about what happened and calls into question their credibility. Regardless, we submit that whether (b) (6), (b) (7)(C) said (b) (6), (b) (7)(C) was a student or journalist is a distinction without difference.

Barry J. Kearney
March 26, 2013
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MT/ 

cc: Lafe Solomon
Celeste Mattina
Jayme Sophir
Miriam Szapiro
Meghan Phillips

GIBSON DUNN

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Client: 95358-00201

June 12, 2013

Joanna Silverman
Supervisory Field Attorney
Region 31, National Labor Relations Board
11150 W. Olympic Blvd., Suite 600
Los Angeles, CA 90064-1825

Re: Walmart (31-CA-083730 and 31-CA-087964)

Dear Ms. Silverman:

Attached is the Settlement Agreement and Notice signed on behalf of Walmart, as proposed by the Board and agreed to by Walmart.

We will await further communication from you. Thank you for your assistance in resolving this matter.

Yours truly



Scott A. Kruse

SAK (b) (6), (b) (7)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF

Walmart

Cases 31-CA-083730

31-CA-087964

Subject to the approval of the Regional Director for the National Labor Relations Board, the Charged Party and the Charging Party **HEREBY AGREE TO SETTLE THE ABOVE MATTER AS FOLLOWS:**

MAILING OF NOTICE — After the Regional Director has approved this Agreement, the Regional Office will send copies of the approved Notices to the Charged Party in English and in additional languages if the Regional Director decides that it is appropriate to do so. A responsible official of the Charged Party will then sign and date those Notices and copy and mail, at its own expense, to (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) a copy of the attached Notice. Those Notices will be signed by a responsible official of the Charged Party and show the date of mailing. The Charged Party will provide the Regional Director written confirmation of the date of mailing.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

NON-ADMISSION CLAUSE — By entering into this Settlement Agreement, the Charged Party does not admit that it has violated the National Labor Relations Act.

SCOPE OF THE AGREEMENT — This Agreement settles only the following allegations in the above-captioned case(s), and does not settle any other case(s) or matters.

- The Charged Party violated Section 8(a)(1) of the Act by interrogating an employee.
- The Charged Party violated Section 8(a)(1) of the Act by engaging in surveillance.

It does not prevent persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters that happened before this Agreement was approved regardless of whether General Counsel knew of those matters or could have easily found them out. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned cases for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

PARTIES TO THE AGREEMENT — If the Charging Party fails or refuses to become a party to this Agreement and the Regional Director determines that it will promote the policies of the National Labor Relations Act, the Regional Director may approve the settlement agreement and decline to issue or reissue a Complaint in this matter. If that occurs, this Agreement shall be between the Charged Party and the undersigned Regional Director. In that case, a Charging Party may request review of the decision to approve the Agreement. If the General Counsel does not sustain the Regional Director's approval, this Agreement shall be null and void.


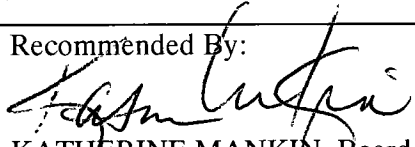
AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO CHARGED PARTY — Counsel for the Charged Party authorizes the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement, original notices and a certification of posting directly to the Charged Party. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

Yes _____
 Initials

No AK
 Initials

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE — Each party to this Agreement will notify the Regional Director in writing what steps the Charged Party has taken to comply with the Agreement. This notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. If the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that the Charging Party did not request review or that the General Counsel sustained the Regional Director's approval of this agreement. No further action shall be taken in the above captioned cases provided that the Charged Party complies with the terms and conditions of this Settlement Agreement and Notice.

Charged Party WALMART		Charging Party WAREHOUSE WORKERS UNITED	
By: Name and Title	Date	By: Name and Title	Date
/s/ Scott A. Kruse, Counsel	6-12-13	 ELI NADWRIS-WEISSMAN, Atty.	6/14/13
Recommended By:  KATHERINE MANKIN, Board Agent	Date 6-25-2013	Approved By: /s/ Mori Pam Rubin Regional Director, Region 31	Date 6/25/13

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT ask you about your union membership or support.

WE WILL NOT engage in unlawful surveillance to find out about your union activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL confirm that any recording(s) and/or notes from the June 6, 2012 interview of (b) (6), (b) (7)(C) at the press conference co-sponsored by Warehouse Workers United and the Los Angeles County Federation of Labor do not exist or that they have been destroyed and **WE WILL NOT** use the information obtained from that June 6, 2012 interview against anyone in any way.

WALMART

Dated: 6/18/13 By:

(b) (6), (b) (7)(C)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

National Labor Relations Board, Region 31
11500 W OLYMPIC BLVD
STE 600
LOS ANGELES, CA 90064

Telephone: (310) 235-7351
Hours of Operation: 8:30 a.m. to 5 p.m.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF

Mercury Public Affairs (MPA)

Cases 31-CA-083730

31-CA-087966

Subject to the approval of the Regional Director for the National Labor Relations Board, the Charged Party and the Charging Party **HEREBY AGREE TO SETTLE THE ABOVE MATTER AS FOLLOWS:**

MAILING OF NOTICE — After the Regional Director has approved this Agreement, the Regional Office will send copies of the approved Notices to the Charged Party in English and in additional languages if the Regional Director decides that it is appropriate to do so. A responsible official of the Charged Party will then sign and date those Notices and copy and mail, at its own expense, to (b) (6), (b) (7)(C) a copy of the attached Notice. Those Notices will be signed by a responsible official of the Charged Party and show the date of mailing. The Charged Party will provide the Regional Director written confirmation of the date of mailing.

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- The Charged Party violated Section 8(a)(1) of the Act by interrogating an employee.
- The Charged Party violated Section 8(a)(1) of the Act by engaging in surveillance.

It does not prevent persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters that happened before this Agreement was approved regardless of whether General Counsel knew of those matters or could have easily found them out. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned cases for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

PARTIES TO THE AGREEMENT — If the Charging Party fails or refuses to become a party to this Agreement and the Regional Director determines that it will promote the policies of the National Labor Relations Act, the Regional Director may approve the settlement agreement and decline to issue or reissue a Complaint in this matter. If that occurs, this Agreement shall be between the Charged Party and the undersigned Regional Director. In that case, a Charging Party may request review of the decision to approve the Agreement. If the General Counsel does not sustain the Regional Director's approval, this Agreement shall be null and void.

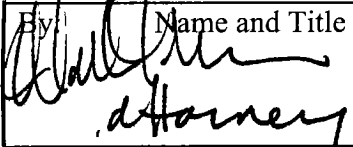


AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO CHARGED PARTY — Counsel for the Charged Party authorizes the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement, original notices and a certification of posting directly to the Charged Party. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

Yes _____
Initials

No  _____
Initials

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

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Charged Party MERCURY PUBLIC AFFAIRS (MPA)		Charging Party WAREHOUSE WORKERS UNITED	
By: Name and Title  Attorney	Date 12 June 2013	By: Name and Title /s/ Eli Naduris-Weissman, Atty	Date 6/14/2013
Recommended By:  KATHERINE MANKIN, Board Agent	Date 24 June 2013	Approved By:  Regional Director, Region 31	Date 6/24/13

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT ask you about your union membership or support.

WE WILL NOT engage in unlawful surveillance to find out about your union activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL confirm that any recording(s) and/or notes from the June 6, 2012 interview of (b) (6), (b) (7)(C) at the press conference co-sponsored by Warehouse Workers United and the Los Angeles County Federation of Labor do not exist or that they have been destroyed and **WE WILL NOT** use the information obtained from that June 6, 2012 interview against anyone in any way.

MERCURY PUBLIC AFFAIRS (MPA)

(b) (6), (b) (7)(C)

Dated: 6/17/13 By:

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

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UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 31
11500 West Olympic Blvd - Suite 600
Los Angeles, CA 90064-1753

Agency Website: www.nlrb.gov
Telephone: (310)235-7351
Fax: (310)235-7420

September 18, 2013

Mark Theodore, Esq.
Proskauer Rose
2049 Century Park East, 32nd Floor
Los Angeles, CA 90067-3101

Scott A. Kruse, Attorney
Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, CA 90071-3449

Re: Mercury Public Affairs (MPA)
and Walmart
Case 31-CA-083730

Walmart
Case 31-CA-087964

Mercury Public Affairs (MPA)
Case 31-CA-087966

Gentlemen:

The above-captioned cases have been closed on compliance. However, this Office may institute further proceedings if subsequent violations occur.

Very truly yours,

/s/ Mori Pam Rubin

MORI PAM RUBIN
Regional Director

cc: Eli Naduris-Weissman, Attorney at Law
Rothner Segall & Greenstone
510 South Marengo Avenue
Pasadena, CA 91101-3115

Guadalupe Palmas
Warehouse Workers United
601 S. Milliken Avenue, Suite A
Ontario, CA 91761-7898

FORM EXEMPT UNDER 44 U.S.C. 3512

INTERNET
FORM NLRB-501
(2-08)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER**DO NOT WRITE IN THIS SPACE**

Case

Date Filed

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Walmart		b. Tel. No. 800-925-8278
		c. Cell No.
		f. Fax No.
d. Address (Street, city, state, and ZIP code) Walmart Office of Community & Gov't Relations, 702 Southwest, 8th Street, Bentonville, AR 72716	e. Employer Representative (b) (6), (b) (7)(C) (b) (6), (b) (7)(C)	g. e-Mail
		h. Number of workers employed
i. Type of Establishment (factory, mine, wholesaler, etc.) Retail	j. Identify principal product or service Retail	

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (1st subsections) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Within the last six months, the above-named employer, has used its agent to spy and report to it on employees' union and/or protected, concerted activities.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

Warehouse Workers United

4a. Address (Street and number, city, state, and ZIP code) 601 S. Milliken Ave., Suite A Ontario, CA 91761	4b. Tel. No. 213-453-8454
	4c. Cell No. (b) (6), (b) (7)(C)
	4d. Fax No.
	4e. e-Mail (b) (6), (b) (7)(C)

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) Warehouse Workers United

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By 
(signature of representative or person making charge)Eli Naduris-Weissman, Attorney
(Print type name and title or office, if any)

Address 501 South Marengo Ave., Pasadena, CA 91101

8/22/2012
(date)

Tel. No. 626-796-7555
Office, if any, Cell No.
Fax No. 626-577-0124
e-Mail enaduris-weissman@rsglabor.c

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

September 11, 2012

VIA FACSIMILE, EMAIL AND OVERNIGHT MAIL

Miguel A. Manriquez, Esq.
Field Attorney
National Labor Relations Board, Region 31
11150 West Olympic Blvd.
Los Angeles, CA 90064-1825

Re: Mercury Public Affairs and Walmart
Case No. 31-CA-083730 and
Walmart (Warehouse Workers Untied)
Case No. 31-CA-087964

Dear Mr. Manriquez:

This letter on behalf of Walmart is in response to the second unfair labor practice (ULP) charge filed by the Warehouse Workers United (WWU) against Walmart (Case No. 31-CA-086964) alleging that Walmart used its agent to spy and report to it on employees' union and/or protected, concerted activities. You stated to me that this charge was solely in connection with the same June 6, 2012 press conference attended by (b) (6), (b) (7)(C). This second ULP charge adds nothing to the first charge and is equally without basis or merit (see Walmart's August 15, 2012 Position Statement and documents submitted to the NLRB ("August 15 Statement") which also responds to this second ULP charge as well as the earlier charge by WWU).

No Unlawful Spying

Walmart did not use, employ or hire (b) (6), (b) (7)(C) or (b) (6), (b) (7)(C) employer Mercury Public Affairs (Mercury) to spy or report to it on employees' union and/or protected, concerted activities. This is more fully detailed and documented in Walmart's August 15 Statement, as well as in Mercury's August 15, 2012 Statement of Position together with documents and declarations submitted to the NLRB ("Mercury's Statement"). Those statements, documents and declarations are equally responsive to the new duplicative charge (as is this supplemental letter responsive to both the new and the original charges).

Mercury was retained to perform "public relations, community relations and media relations services related to Walmart's involvement in Los Angeles, CA." (See Exhibit A to the

Miguel A. Manriquez, Esq.
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Page 2

August 15 Statement, a copy of the Public Affairs/Media Relations Representation Agreement between Walmart and Mercury, in particular its Scope of Work Article 2, which specifies Mercury's public relations/media relations function and does not involve employee relations at all, much less spying or reporting on employees' union or protected, concerted activities.)

The fact that (b) (6), (b) (7)(C) of Mercury was not employed or used to spy and report on employees' union activities is also confirmed by:

- 1) Walmart (b) (6), (b) (7)(C) June 5 email to (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) of Mercury. (Exhibit B to Walmart's August 15 Statement)
- 2) (b) (6), (b) (7)(C) Declaration (Exhibit B to Mercury's Statement), see paragraphs 5, 6 and 10)
- 3) Mercury (b) (6), (b) (7)(C) declaration (Exhibit C to Mercury's Statement), see paragraphs 6, 7 and 8

As those documents and declarations demonstrate, (b) (6), (b) (7)(C) was not sent to the June 6, 2012 public press conference to spy on employees' union or protected activities. (b) (6), (b) (7)(C) was sent there to "report on the names of reporters and [media] outlets present, as well as the number of people present, and what people were saying" at the press conference (b) (6), (b) (7)(C) Declaration, paragraphs 5 and 6, and (b) (6), (b) (7)(C) Declaration, paragraph 7).

(b) (6), (b) (7)(C) was in no way asked or authorized to spy and report on employees' union or protected activities, nor did (b) (6), (b) (7)(C) report on any such activity to Walmart or Mercury (b) (6), (b) (7)(C) Declaration, paragraph 10 and (b) (6), (b) (7)(C) Declaration, paragraphs 7, 8 and 9).

(b) (6), (b) (7)(C) misrepresentation of her identity as (b) (6), (b) (7)(C) and of (b) (6), (b) (7)(C) as a reporter and (b) (6), (b) (7)(C) interview of (b) (6), (b) (7)(C) were not authorized by either Walmart or Mercury, and neither of them knew about those things until a week later when the WWU found out (b) (6), (b) (7)(C) was with Mercury doing public/media relations work for Walmart. (b) (6), (b) (7)(C) "took those actions on (b) (6), (b) (7)(C) own." (b) (6), (b) (7)(C) Declaration, paragraph 10)

Furthermore, putting aside the strict instructions given to (b) (6), (b) (7)(C) for the public press conference, in any event, (b) (6), (b) (7)(C) actions do not constitute unlawful surveillance of employees' union activities (as set forth in Walmart's August 15 Statement at pp. 7-9). Even if they somehow did, Walmart would not be liable for them because (b) (6), (b) (7)(C) was not Walmart's agent for purposes of these unauthorized actions (see Walmart's August 15 Statement at pp. 4-5).

Miguel A. Manriquez, Esq.
September 11, 2012
Page 3

(Nor did (b) (6), (b) (7)(C) report to either Walmart or Mercury on (b) (6), (b) (7)(C) interview of (b) (6), (b) (7)(C) precisely because (b) (6), (b) (7)(C) knew that was not what (b) (6), (b) (7)(C) was asked to do.)

Furthermore, the WWU and (b) (6), (b) (7)(C) were at the public press conference for the very purpose of getting their positions and statements on Walmart out to the public through the media and that is why WWU public supporter (b) (6), (b) (7)(C) was there to be interviewed and was offered up by the WWU. A charge of “spying” in these circumstances where the WWU and (b) (6), (b) (7)(C) were seeking such publicity is without meaning or basis. (See the cases cited at p. 8 of Walmart’s Aug. 15 Statement.)

The Cases Cited In The Board’s Cover Letter To The Charge Are Inapplicable Here

Harvey Aluminum, Inc., 139 NLRB 161 (1962), and Virginia Elec. and Power Co., 44 NLRB 404 (1942), have absolutely no application here. In Harvey Aluminum, “Respondents Harvey and General employed Respondent Wallace to learn and report on the identity of those of their employees who favored union organization. Wallace operatives, ostensibly hired by Harvey and General as production workers, acted as labor spies and reported the identity of prounion sympathizers to Respondents.” (*Id.*, at 153) Of course, the Respondents there engaged in unlawful surveillance of union activities. However, none of that is present in our case. Walmart did not “employ (b) (6), (b) (7)(C) to learn and report on the identity of those of their employees who favored union authorization.” (b) (6), (b) (7)(C) was not hired or asked to do that, (b) (6), (b) (7)(C) did not do that, and (b) (6), (b) (7)(C) did not report any such identity or information to Walmart (or Mercury) about that. Harvey Aluminum is totally inapplicable to this case.

Virginia Power & Elec. Co., 44 NLRB 404 (1942), is equally inapplicable here. In that case, the Board unsurprisingly “find[s] that the respondent, by employing an undercover operative to report on organizational activities of its Norfolk employees and by questioning employees suspected of engaging in union activities as to such matters, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.” *Id.* at 427. None of that occurred in our case. Walmart did not employ Mercury or (b) (6), (b) (7)(C) as an “undercover agent” (b) (6), (b) (7)(C) misrepresented (b) (6), (b) (7)(C) entirely on (b) (6), (b) (7)(C) own), nor did Walmart employ Mercury or (b) (6), (b) (7)(C) “to report on organizational activities of its employees”, nor to “question employees suspected of engaging in union activities.” (In addition, (b) (6), (b) (7)(C) the person (b) (6), (b) (7)(C) interviewed, was not a Walmart employee, but rather simply a person who chose to be interviewed by the press at the press conference and to state publicly (b) (6), (b) (7)(C) support of the WWU and views about Walmart.)

The Harvey Aluminum, Inc. and Virginia Elec. and Power Co. cases have nothing to do with this case. The relevant cases are Wackenhut, 348 NLRB 1290 (2006); MacLean Power Systems, 2007 NLRB Lexis 392; Metal Industries, Inc., 251 NLRB 1523 (1980); Walmart Stores, Inc. & UFCW, 352 NLRB 815 (2007); Ark Las Vegas Restaurant Corp., 333 NLRB

Miguel A. Manriquez, Esq.
September 11, 2012
Page 4

1284 (2001); and The Continental Group, Inc., 353 NLRB 348 (2008), all cited and discussed at p. 8 of Walmart's Aug. 15 Statement.

In Ark Las Vegas Restaurant Corp., *supra*, the Board rejected unlawful surveillance and interrogation charges where: "[the employee] had gone to the [union] rally in full view of anyone who wanted to look. Indeed, it was such a public matter that 'surveillance' seems to be an antilogy in the circumstances. The Union was pleading for the world to look and listen. That [the supervisor] observed what was happening can be no surprise." 333 NLRB at 1303. Likewise, here, the WWU held a press conference and offered (b) (6), (b) (7)(C) to be interviewed so that they could get their message out to the world - for the WWU to claim unlawful surveillance or spying in these circumstances is specious.

Similarly, in The Continental Group, Inc., 353 NLRB 348, the Board found no unlawful surveillance by Continental officials in attending a press conference sponsored by a union. These and the other cases cited in the Aug. 15 Statement demonstrate that there was no unlawful surveillance, nor could there be, in the present case.

In our phone conversation, you also cited New York, New York, LLC, 356 NLRB No. 119 (2011). That case, which was not a surveillance case, held that the New York, New York casino could not prohibit the off-duty employees of a restaurant operator contractor from distributing handbills to customers of the casino on the casino property where the contractor's employees worked in the restaurants on the property. The unremarkable proposition that such action by the casino restaurant operator could be an unfair labor practice, does not affect at all the Board case law that an entity's conduct cannot constitute unlawful surveillance if the individuals allegedly subject to surveillance were not employees of or applicants for jobs with that accused entity. In our case, not only was there no surveillance of protected activity going on, but Walmart was not and is not aware of any Walmart employee or applicant being at the June 6 press conference (nor did (b) (6), (b) (7)(C) report to Walmart or Mercury about any).

WWU's Shift In Theory Is Totally Contradicted By The Facts and Their Own Statements

The WWU seems to have recognized the insurmountable barriers to there being any unlawful surveillance (or interrogation) here, when the WWU recently has apparently tried to shift its position and alter the facts by claiming that (b) (6), (b) (7)(C) represented (b) (6), (b) (7)(C) simply as a USC student, and not as a student journalist or reporter. The WWU is apparently trying to create an argument that (b) (6), (b) (7)(C) revealed to (b) (6), (b) (7)(C), as simply a student, some secret information about union activities that (b) (6), (b) (7)(C) would not have told to actual reporters who were at the public press conference and by whom (b) (6), (b) (7)(C) expected to be interviewed.

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Both the WWU's shift in position and their contrived claim that (b) (6), (b) (7)(C) revealed some union secrets to (b) (6), (b) (7)(C) are factually false. (b) (6), (b) (7)(C) did not ask for and (b) (6), (b) (7)(C) did not reveal any union secrets to (b) (6), (b) (7)(C) (nor did (b) (6), (b) (7)(C) report any to Walmart or Mercury). Of course, neither the WWU nor the Board has identified any such union secrets that were revealed by (b) (6), (b) (7)(C), since such allegations will not stand the light of day.

The WWU's disingenuous shift of its position is not only false, but it is directly contradicted by the WWU's own statements to the press and on its website in the immediate aftermath of its discovery that (b) (6), (b) (7)(C) had misrepresented (b) (6), (b) (7)(C) as a reporter. The postings and articles showing this are too numerous to list them all, but here is a sample of what the WWU and (b) (6), (b) (7)(C) said to the press and to the world right after the WWU's discovery of (b) (6), (b) (7)(C) identity on June 13, 2012:

- 1) On (b) (6), (b) (7)(C), the day after the WWU discovered (b) (6), (b) (7)(C) identity, Elizabeth Brennan, communications director for the WWU, wrote and posted a blog article that appeared on (b) (6), (b) (7)(C) (copy attached hereto as Exhibit 1) in which the WWU states:

"(b) (6), (b) (7)(C) told warehouse workers (b) (6), (b) (7)(C) was a journalist interested in their plight." (b) (6), (b) (7)(C) is actually (b) (6), (b) (7)(C), a fake 'reporter' working for Walmart."

- 2) The WWU continued to post similar blogs for some time, including a (b) (6), (b) (7)(C) posted blog on the WWU website entitled "(b) (6), (b) (7)(C)" (copy attached as Exhibit 2) in which the WWU again states:

(b) (6), (b) (7)(C) is actually (b) (6), (b) (7)(C), a fake 'reporter' working for Walmart."

"Last week (b) (6), (b) (7)(C) told warehouse workers (b) (6), (b) (7)(C) was a 'reporter' interested in their plight."

- 3) (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) article entitled "(b) (6), (b) (7)(C) (b) (6), (b) (7)(C)" in which the WWU is quoted: "Union Spokeswoman Elizabeth Brennan said (b) (6), (b) (7)(C) interviewed a warehouse worker using an audio recorder without saying (b) (6), (b) (7)(C) was working for Walmart." The article went on to quote WWU's Brennan: "(b) (6), (b) (7)(C) told him (b) (6), (b) (7)(C) was a journalism student at USC and that (b) (6), (b) (7)(C) was a storyteller from the heart," Brennan said." (A copy of the article is attached as Exhibit 3)

- 4) The same (b) (6), (b) (7)(C) article at p.4 contains "a cartoon from the Warehouse Workers United Group's Facebook page" with the title of the cartoon being "Wal*Mart

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Page 6

Creates Jobs In Our Communities!”, under which it had a picture of a (b) (6), (b) (7)(C) with a pen in one hand and journalist’s notebook in the other, with a title underneath her “Fake Journalist To Spy On Warehouse Workers.” (See Exh. 3, p.4)

- 5) The WWU also posted a (b) (6), (b) (7)(C) press release on its website with this lead: (b) (6), (b) (7)(C). The WWU’s press release quoted (b) (6), (b) (7)(C) as follows: “‘We are fighting for better jobs for warehouse workers in Southern California’ said (b) (6), (b) (7)(C), a warehouse worker who was interviewed by a Mercury Public Affairs senior associate posing as a student journalist. ‘Warehouse workers risk retaliation every time we speak to the media and to learn that the company was hiding behind a fake reporter makes me really mad.’” The WWU press release goes on to quote the WWU’s campaign director: “We want Walmart to disclose why it sent a fake reporter.” (A copy of the WWU press release is attached as Exhibit 4).

Thus, both the WWU and (b) (6), (b) (7)(C) have repeatedly stated to the press, on the WWU Facebook page, and in the WWU’s own press release and postings (all during the week after they discovered (b) (6), (b) (7)(C) identity) that (b) (6), (b) (7)(C) falsified her name and falsely represented (b) (6), (b) (7)(C) as a reporter and student journalist.

The WWU cannot have it both ways. They cannot state one set of facts in their press releases and postings, and then revise those facts in an attempt to manufacture a claim. It is too late for the WWU to change its story and now claim that (b) (6), (b) (7)(C) did not misrepresent (b) (6), (b) (7)(C) as a journalist or reporter, when they asked (b) (6), (b) (7)(C) to sign the “media” clipboard and walked (b) (6), (b) (7)(C) over to (b) (6), (b) (7)(C) to have (b) (6), (b) (7)(C) interview (b) (6), (b) (7)(C). The WWU has already put out to the world the true facts of (b) (6), (b) (7)(C) misrepresentation. While it was poor judgment and wrong for (b) (6), (b) (7)(C) to make that misrepresentation of (b) (6), (b) (7)(C) as a journalist/reporter (and Walmart and Mercury have condemned it), it is what it was. The WWU is grabbing for straws that do not exist here (despite Walmart’s and Mercury’s strong and immediate repudiation of the conduct of (b) (6), (b) (7)(C) that did occur).

As more fully discussed in Walmart’s August 15 Statement, notwithstanding the nature and extent of (b) (6), (b) (7)(C) misrepresentations, there was nothing coercive in (b) (6), (b) (7)(C) interview of (b) (6), (b) (7)(C), who was an open and public supporter of the WWU (b) (6), (b) (7)(C) was at the press conference to be interviewed by reporters about (b) (6), (b) (7)(C) WWU support and working conditions). (b) (6), (b) (7)(C) asked (b) (6), (b) (7)(C) if (b) (6), (b) (7)(C) could record the interview (b) (6), (b) (7)(C) agreed) and (b) (6), (b) (7)(C) asked (b) (6), (b) (7)(C) where (b) (6), (b) (7)(C) had worked, what the complaints were about working conditions, and what (b) (6), (b) (7)(C) wanted in better conditions (See (b) (6), (b) (7)(C) Declaration, paragraph 9). (b) (6), (b) (7)(C) did not ask (b) (6), (b) (7)(C) about (b) (6), (b) (7)(C) or the WWU’s organizing or protected activities (although such questions of an openly and publicly avowed WWU supporter would not constitute

Miguel A. Manriquez, Esq.
September 11, 2012
Page 7

unlawful coercive interrogation – see August 15 Statement at pp. 6-7). If (b) (6), (b) (7)(C) claims that (b) (6) was asked questions by (b) (6), (b) (7)(C) about (b) (6), (b) (7)(C) or the WWU's organizing or protected activities (which (b) (6) was not), it is quite clear that (b) (6), (b) (7)(C) will say whatever the WWU wants (b) (6), (b) (7)(C) to say – witness, e.g., the contradictions between (b) (6), (b) (7)(C) quote in the WWU press release stating that (b) (6), (b) (7)(C) “hiding behind a fake reporter makes me really mad” and (b) (6), (b) (7)(C) claim to the Board now that (b) (6), (b) (7)(C) only presented (b) (6), (b) (7)(C) as a USC student, not as a journalist/reporter. (b) (6), (b) (7)(C) may be quite willing to make up the facts, but that doesn't change the actual facts.

We believe that this position statement, along with our prior August 15 position statement, as well as Mercury's August 15 position statement, and all the documents and declarations submitted with each of those position statements, fully answer the issues you raised and demonstrate that both the original and second charges should be dismissed. If the Board had any remaining doubt, we would appreciate the opportunity to discuss the matter with yourself and the Regional Director.

Yours truly,



Scott A. Kruse

SAK (b) (6), (b) (7)(C)

cc: Mori Pam Rubin, Regional Director
Joanna Silverman, Supervising Field Attorney

Exhibit 1

ATTACHMENT/EXHIBIT TO POSITION
STATEMENT WITHHELD PURSUANT TO
EXEMPTIONS 6 and 7(C)

Exhibit 2

ATTACHMENT/EXHIBIT TO POSITION
STATEMENT WITHHELD PURSUANT TO
EXEMPTIONS 6 and 7(C)

Exhibit 3

ATTACHMENT/EXHIBIT TO POSITION
STATEMENT WITHHELD PURSUANT TO
EXEMPTIONS 6 and 7(C)

Exhibit 4

ATTACHMENT/EXHIBIT TO POSITION
STATEMENT WITHHELD PURSUANT TO
EXEMPTIONS 6 and 7(C)

GIBSON DUNN

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SKruse@gibsondunn.com

Client: 95358-00201

June 12, 2013

Joanna Silverman
Supervisory Field Attorney
Region 31, National Labor Relations Board
11150 W. Olympic Blvd., Suite 600
Los Angeles, CA 90064-1825

Re: Walmart (31-CA-083730 and 31-CA-087964)

Dear Ms. Silverman:

Attached is the Settlement Agreement and Notice signed on behalf of Walmart, as proposed by the Board and agreed to by Walmart.

We will await further communication from you. Thank you for your assistance in resolving this matter.

Yours truly



Scott A. Kruse

SAK (b) (6), (b) (7)(C)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF

Walmart

Cases 31-CA-083730

31-CA-087964

Subject to the approval of the Regional Director for the National Labor Relations Board, the Charged Party and the Charging Party **HEREBY AGREE TO SETTLE THE ABOVE MATTER AS FOLLOWS:**

MAILING OF NOTICE — After the Regional Director has approved this Agreement, the Regional Office will send copies of the approved Notices to the Charged Party in English and in additional languages if the Regional Director decides that it is appropriate to do so. A responsible official of the Charged Party will then sign and date those Notices and copy and mail, at its own expense, to (b) (6), (b) (7)(C)

(b) (6), (b) (7)(C) a copy of the attached Notice. Those Notices will be signed by a responsible official of the Charged Party and show the date of mailing. The Charged Party will provide the Regional Director written confirmation of the date of mailing.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

NON-ADMISSION CLAUSE — By entering into this Settlement Agreement, the Charged Party does not admit that it has violated the National Labor Relations Act.

SCOPE OF THE AGREEMENT — This Agreement settles only the following allegations in the above-captioned case(s), and does not settle any other case(s) or matters.

- The Charged Party violated Section 8(a)(1) of the Act by interrogating an employee.
- The Charged Party violated Section 8(a)(1) of the Act by engaging in surveillance.

It does not prevent persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters that happened before this Agreement was approved regardless of whether General Counsel knew of those matters or could have easily found them out. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned cases for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

PARTIES TO THE AGREEMENT — If the Charging Party fails or refuses to become a party to this Agreement and the Regional Director determines that it will promote the policies of the National Labor Relations Act, the Regional Director may approve the settlement agreement and decline to issue or reissue a Complaint in this matter. If that occurs, this Agreement shall be between the Charged Party and the undersigned Regional Director. In that case, a Charging Party may request review of the decision to approve the Agreement. If the General Counsel does not sustain the Regional Director's approval, this Agreement shall be null and void.


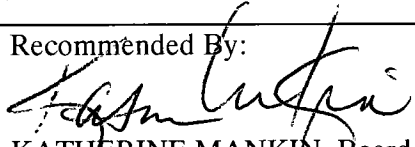
AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO CHARGED PARTY — Counsel for the Charged Party authorizes the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement, original notices and a certification of posting directly to the Charged Party. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

Yes _____
 Initials

No AK
 Initials

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE — Each party to this Agreement will notify the Regional Director in writing what steps the Charged Party has taken to comply with the Agreement. This notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. If the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that the Charging Party did not request review or that the General Counsel sustained the Regional Director's approval of this agreement. No further action shall be taken in the above captioned cases provided that the Charged Party complies with the terms and conditions of this Settlement Agreement and Notice.

Charged Party WALMART		Charging Party WAREHOUSE WORKERS UNITED	
By: Name and Title	Date	By: Name and Title	Date
/s/ Scott A. Kruse, Counsel	6-12-13	 ELI NADWRIS-WEISSMAN, Atty.	6/14/13
Recommended By:  KATHERINE MANKIN, Board Agent	Date 6-25-2013	Approved By: /s/ Mori Pam Rubin Regional Director, Region 31	Date 6/25/13

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT ask you about your union membership or support.

WE WILL NOT engage in unlawful surveillance to find out about your union activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL confirm that any recording(s) and/or notes from the June 6, 2012 interview of (b) (6), (b) (7)(C) at the press conference co-sponsored by Warehouse Workers United and the Los Angeles County Federation of Labor do not exist or that they have been destroyed and **WE WILL NOT** use the information obtained from that June 6, 2012 interview against anyone in any way.

WALMART

Dated: 6/18/13 By:

(b) (6), (b) (7)(C)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

National Labor Relations Board, Region 31
11500 W OLYMPIC BLVD
STE 600
LOS ANGELES, CA 90064

Telephone: (310) 235-7351
Hours of Operation: 8:30 a.m. to 5 p.m.



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 31
11500 West Olympic Blvd - Suite 600
Los Angeles, CA 90064-1753

Agency Website: www.nlrb.gov
Telephone: (310)235-7351
Fax: (310)235-7420

September 18, 2013

Mark Theodore, Esq.
Proskauer Rose
2049 Century Park East, 32nd Floor
Los Angeles, CA 90067-3101

Scott A. Kruse, Attorney
Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, CA 90071-3449

Re: Mercury Public Affairs (MPA)
and Walmart
Case 31-CA-083730

Walmart
Case 31-CA-087964

Mercury Public Affairs (MPA)
Case 31-CA-087966

Gentlemen:

The above-captioned cases have been closed on compliance. However, this Office may institute further proceedings if subsequent violations occur.

Very truly yours,

/s/ Mori Pam Rubin

MORI PAM RUBIN
Regional Director

cc: Eli Naduris-Weissman, Attorney at Law
Rothner Segall & Greenstone
510 South Marengo Avenue
Pasadena, CA 91101-3115

Guadalupe Palmas
Warehouse Workers United
601 S. Milliken Avenue, Suite A
Ontario, CA 91761-7898

FORM EXEMPT UNDER 44 U.S.C. 3512

INTERNET
FORM NLRB-501
(2-05)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case

32-CA-237152

Date Filed

03-05-2019

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer

Walmart, Inc.

b. Tel. No. (530) 621-2917

c. Cell No.

f. Fax No.

d. Address (Street, city, state, and ZIP code)

4300 Missouri Flat Road
Placerville, CA 95667

e. Employer Representative

(b) (6), (b) (7)(C)

g. e-Mail

h. Number of workers employed
150

i. Type of Establishment (factory, mine, wholesaler, etc.)

Retail store

j. Identify principal product or service

General goods

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (3)

of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

On or about (b) (6), (b) (7)(C) 2018, the above-named Employer discharged an employee in retaliation for and/or because of that employee's protected concerted and/or Union activities.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

(b) (6), (b) (7)(C)

4a. Address (Street and number, city, state, and ZIP code)

(b) (6), (b) (7)(C)

4b. Tel. No. (b) (6), (b) (7)(C)

4c. Cell No. (b) (6), (b) (7)(C)

4d. Fax No.

4e. e-Mail

(b) (6), (b) (7)(C)

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

(b) (6), (b) (7)(C)

By (b) (6), (b) (7)(C) an individual

(Print type name and title or office, if any)

Tel. No. (b) (6), (b) (7)(C)

Office, if any Cell No.
(b) (6), (b) (7)(C)

Fax No.

e-Mail

(b) (6), (b) (7)(C)

Address (b) (6), (b) (7)(C)

3-4-19
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is

Steven D. Wheelless
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602 257 5200 main
602 257 5299 fax
www.steptoe.com



April 22, 2019

VIA E-FILE AND E-MAIL

Alexander M. Hajduk
Field Examiner
1301 Clay Street, Suite 300N
Oakland, CA 94612

RE: WALMART: Charge No. 32-CA-237152

Dear Mr. Hajduk:

Walmart Stores, Inc. appreciates the opportunity to respond to (b) (6), (b) (7)(C) March 5, 2019 Charge, as supplemented by your April 9 correspondence. (b) (6), (b) (7)(C) alleges that Walmart discharged (b) (6), (b) (7)(C) on (b) (6), (b) (7)(C), 2018, in retaliation for and/or because of (b) (6), (b) (7)(C) protected concerted and/or Union activities, which (b) (6), (b) (7)(C) states relates to (b) (6), (b) (7)(C) speech at Walmart's Shareholders Meeting on (b) (6), (b) (7)(C), 2016.

Notably, this is (b) (6), (b) (7)(C) second bite of the apple as the Region dismissed (b) (6), (b) (7)(C) virtually identical December 12, 2018 Charge (32-CA-232725) for (b) (6), (b) (7)(C) lack of cooperation with the Region's investigation – likely because (b) (6), (b) (7)(C) knew that previous Charge had no merit. (b) (6), (b) (7)(C) second attempt fares no better, as (b) (6), (b) (7)(C) current Charge still fails as a matter of fact and law as we discussed during our April 15 phone conversation. Based on that conversation and the contents of the Region's investigative file as is, you stated that it would not be necessary for Walmart to provide a "full-fledged" response to (b) (6), (b) (7)(C) allegations in (b) (6), (b) (7)(C) Charge, but that, if it wanted to, it could quickly respond to further assist the Region before it met to make its final decision.

Accordingly, below Walmart provides supporting evidence to show that (b) (6), (b) (7)(C) Charge fails under the *Wright Line* analysis for several reasons as we discussed. First, Walmart bore no animus towards (b) (6), (b) (7)(C) for (b) (6), (b) (7)(C) speech at the Shareholders Meeting in (b) (6), (b) (7)(C) 2016. In fact, Walmart promoted (b) (6), (b) (7)(C) after (b) (6), (b) (7)(C) returned from that meeting. Moreover, no temporal proximity exists between (b) (6), (b) (7)(C) speech in (b) (6), (b) (7)(C) 2016 and (b) (6), (b) (7)(C) discharge over two years later in (b) (6), (b) (7)(C) 2018. Also, at no time during the discharge process did any manager tie (b) (6), (b) (7)(C) prior speech to (b) (6), (b) (7)(C) discharge. Further, (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) expressly told (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) was rehirable and explained the process for (b) (6), (b) (7)(C) to reapply. Second, Walmart discharged (b) (6), (b) (7)(C) for legitimate, non-discriminatory reasons under its progressive discipline process. Specifically, while on the last level of discipline, (b) (6), (b) (7)(C) violated important "Controls" policies when (b) (6), (b) (7)(C) allowed a customer to leave with gun ammunition without paying for it at (b) (6), (b) (7)(C) department and left (b) (6), (b) (7)(C) keys unsecured in the restroom. Notably, (b) (6), (b) (7)(C) admitted to both policy violations. Third, Walmart routinely disciplines other similarly-situated associates for the same violations (as well as profanity and safety/safe work practices, which were (b) (6), (b) (7)(C) prior disciplinary actions) and discharges similarly-situated associates when they reach their last level in the progressive discipline process, as it did with (b) (6), (b) (7)(C).

Significantly, after (b) (6), (b) (7)(C) discharge, and after (b) (6), (b) (7)(C) filed both Charges, (b) (6), (b) (7)(C) came to the store and told (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) had nothing against (b) (6), (b) (7)(C) and thought (b) (6), (b) (7)(C) was great to (b) (6), (b) (7)(C), but that (b) (6), (b) (7)(C) filed the Charges because (b) (6), (b) (7)(C) recently got into a car accident and was (b) (6), (b) (7)(C), and that (b) (6), (b) (7)(C).

After you review the analysis below, we trust you will agree that Walmart did not violate the Act as alleged.¹

I. FACTUAL BACKGROUND.

A. Walmart Promoted (b) (6), (b) (7)(C) After (b) (6), (b) (7)(C) Spoke At Walmart's Shareholders Meeting In (b) (6), (b) (7)(C) 2016.

Walmart hired (b) (6), (b) (7)(C) as a (b) (6), (b) (7)(C) at Store 2418 in Placerville, California in (b) (6), (b) (7)(C). [Tab 1.] In (b) (6), (b) (7)(C) 2012, (b) (6), (b) (7)(C) transferred to (b) (6), (b) (7)(C). [Tab 2.]

Each year Walmart holds its Shareholders Meeting in Bentonville, Arkansas. Thousands of employees (known as "associates") from around the world attend the event. On (b) (6), (b) (7)(C), 2016, (b) (6), (b) (7)(C) spoke at the Shareholders Meeting during the section for shareholder proposals. In part, (b) (6), (b) (7)(C) stated that (b) (6), (b) (7)(C) had yet to see positive changes at (b) (6), (b) (7)(C) store and was still struggling to make ends meet. See (b) (6), (b) (7)(C).

In (b) (6), (b) (7)(C) 2016, (b) (6), (b) (7)(C) became (b) (6), (b) (7)(C) at Store 2418. As (b) (6), (b) (7)(C) does with other associates, (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) got along well and had a good working relationship. The following year, in (b) (6), (b) (7)(C) 2017, management promoted (b) (6), (b) (7)(C) to the (b) (6), (b) (7)(C). [Tab 3.]

B. Walmart Follows A Progressive Disciplinary Process.

Walmart's Disciplinary Action Policy (formerly known as Coaching for Improvement Policy) provides four levels of progressive discipline: First Written, Second Written, Third Written, and discharge. [Tab 4.] Each disciplinary action remains active for 12 months. [Id.] Walmart imposes the next level of discipline on an associate if he or she engages in unacceptable conduct during the next 12 months, even if the conduct differs from the conduct that led to the previous disciplinary action(s). [Id.] The Policy further informs associates that "[i]f your unacceptable job performance or conducts warrants disciplinary action and you have already received a Third Written within the previous 12 months, you will be subject to termination." [Id.] A discharge based on exhausting all progressive disciplinary steps is generally coded as a discharge for "misconduct with coachings." (b) (6), (b) (7)(C) understood Walmart's

¹ As you stated that the Region requests Walmart provide only a brief/quick response at this point based on the current evidence in the Region's file, should the Region decide anything other than to seek a withdrawal or issue a dismissal of the Charge, Walmart reserves the right to supplement this response to further demonstrate that (b) (6), (b) (7)(C) Charge has no merit.

progressive disciplinary process because (b) (6), (b) (7)(C) received training on it during orientation and received reminders about it throughout (b) (6), (b) (7)(C) employment at the store. [Tab 5.]

C. On (b) (6), (b) (7)(C), 2018, Under Its Progressive Discipline Process, Walmart Discharged (b) (6), (b) (7)(C) For Violating Key Controls And Ammunition Sales Policies.

1. (b) (6), (b) (7)(C) Received Extensive Training Regarding Walmart's Key Controls And Ammunition Sales Policies.

(b) (6), (b) (7)(C) first received training regarding Walmart's Key and Door Controls Policy as a (b) (6), (b) (7)(C) (b) (6), (b) (7)(C). Control of the store's keys (and doors) is extremely important to store operations. Under the Policy, "[k]ey control is needed to secure facilities, personnel, property and information" and Walmart has extensive procedures in place to ensure compliance. [Tab 6.] Non-managerial associates must sign out and return "temporary" keys that they use in their departments as those keys must be accounted for at the end of each business day by a salaried manager or Support Manager. Once promoted as a (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) again received training regarding Walmart's Key and Door Controls Policy as (b) (6), (b) (7)(C) responsibilities included ensuring that (b) (6), (b) (7)(C) locked and secured ammunition, air guns, knives, fishing equipment, and other merchandise for sale in the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C).

As a (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) also received training regarding Walmart's Sale of Ammunition and Firearms Policy. That Policy "covers the handling, storage, and sale of ammunition" and states, "[t]he appropriate sale of ammunition and firearms in Walmart's stores is a critical part of serving our customers." [Tab 7.] Because appropriately handling and selling ammunition and firearms is an essential part of the position, (b) (6), (b) (7)(C) must complete all required certifications and undergo a Department of Justice, Bureau of Firearms background check. [Tabs 6 and 7.] (b) (6), (b) (7)(C) received such certification. [Tab 8.] Under the Policy, "[a]ll ammunition for use in a handgun must be stored behind the sporting goods counter *where it is inaccessible to the customer*" and may "need to be in locking ammunition fixtures." [Tab 7 (emphasis added).] Further, the Policy specifically instructs (b) (6), (b) (7)(C) that: *"All keys to display cases must be kept in the possession of a trained (b) (6), (b) (7)(C). Never leave keys unsecured or hanging within reach of customers. Maintain all Sporting Goods keys in accordance with the Key and Door Controls Policy."* [Id. (emphasis added).]

"Failure to comply with [the above Policies] can result in disciplinary action up to and including termination." [Tabs 6 and 7.]

2. In (b) (6), (b) (7)(C), 2018, (b) (6), (b) (7)(C) Let A Customer Leave With Ammunition Without Paying For It And Left (b) (6), (b) (7)(C) Keys Unsecured In The Restroom.

On (b) (6), (b) (7)(C), 2018, (b) (6), (b) (7)(C) was assisting a customer with an ammunition purchase in the (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) scanned the ammunition, but walked away from the counter before the customer completed the purchase. While (b) (6), (b) (7)(C) was away from the counter, the customer took the ammunition and walked away without paying for it. (b) (6), (b) (7)(C) called (b) (6), (b) (7)(C) to immediately come back to the (b) (6), (b) (7)(C). As (b) (6), (b) (7)(C) approached, (b) (6), (b) (7)(C) looked flustered and asked (b) (6), (b) (7)(C) if (b) (6), (b) (7)(C) had rung up (b) (6), (b) (7)(C) purchasing ammunition, but (b) (6), (b) (7)(C) said (b) (6), (b) (7)(C) had not. (b) (6), (b) (7)(C) told (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) had handed ammunition to (b) (6), (b) (7)(C), but that (b) (6), (b) (7)(C) walked

away with it without paying for it in the (b) (6), (b) (7)(C) as required. (b) (6), (b) (7)(C) informed (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) immediately investigated, but could not confirm that the customer paid for the ammunition. Upon further review, (b) (6), (b) (7)(C) confirmed that (b) (6), (b) (7)(C) did not complete the ammunition transaction before (b) (6), (b) (7)(C) walked away from the customer, which allowed the customer to leave with the ammunition without paying for it in the (b) (6), (b) (7)(C) as required.

Before management could complete its investigation, the next day, on (b) (6), (b) (7)(C), 2019, an associate discovered keys to the Sporting Goods Department unsecured in the family restroom in the back of the store. The associate returned the keys to (b) (6), (b) (7)(C). Upon further research, management determined that (b) (6), (b) (7)(C) was responsible for leaving those keys unsecured in the restroom.

Over the next few days, (b) (6), (b) (7)(C) interviewed (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) about the incidents. As part of (b) (6), (b) (7)(C) investigation, (b) (6), (b) (7)(C) asked them if they would write statements, which they did. [Tabs 9 and 10.] (b) (6), (b) (7)(C) admitted that (b) (6), (b) (7)(C) gave the customer the ammunition and that (b) (6), (b) (7)(C) walked away with it without paying for it in the Sporting Goods Department. (b) (6), (b) (7)(C) also admitted that (b) (6), (b) (7)(C) left the keys for the Sporting Goods Department in the family restroom. With respect to both incidents, (b) (6), (b) (7)(C) claimed that (b) (6), (b) (7)(C) was extremely busy and rushed.

After providing statements to (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) came to see (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) asked (b) (6), (b) (7)(C) what was going to happen to (b) (6), (b) (7)(C) regarding the incidents with the ammunition and the keys. (b) (6), (b) (7)(C) stated that they were still investigating the incidents, but that violations of Walmart's Key Controls Policy, for example, results in the next level of discipline. After again admitting to leaving the keys in the restroom because (b) (6), (b) (7)(C) was in a hurry, (b) (6), (b) (7)(C) stated that (b) (6), (b) (7)(C) was on a Third Written and that the next step was discharge. (b) (6), (b) (7)(C) responded again that they were still investigating the incidents and that they would follow up with (b) (6), (b) (7)(C).

3. Because (b) (6), (b) (7)(C) Had An Active Third Written Disciplinary Action, (b) (6), (b) (7)(C) Key Controls And Ammunition Sales Violations Resulted In (b) (6), (b) (7)(C) Discharge.

Once (b) (6), (b) (7)(C) concluded that (b) (6), (b) (7)(C) violated Walmart's policies, (b) (6), (b) (7)(C) confirmed what level of discipline was warranted under Walmart's progressive discipline process. At the time of (b) (6), (b) (7)(C) violations on (b) (6), (b) (7)(C), 2018, (b) (6), (b) (7)(C) had an active Third Written disciplinary action, which (b) (6), (b) (7)(C) received on (b) (6), (b) (7)(C), 2017. [Tab 11.] Significantly, that disciplinary action also involved (b) (6), (b) (7)(C) failure to control (b) (6), (b) (7)(C) keys. There, while working the evening shift in (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) left (b) (6), (b) (7)(C) keys unattended in the outside fence area of the patio, which another associate found and returned to management. Management explained to (b) (6), (b) (7)(C) the possibility of theft that could occur when associates leave their keys accessible to the public and the cost to the store if it has to install new locks because of lost or stolen keys. (b) (6), (b) (7)(C) admitted that (b) (6), (b) (7)(C) left her keys unsecured and stated that (b) (6), (b) (7)(C) would do (b) (6), (b) (7)(C) best to hold on to them in the future.

(b) (6), (b) (7)(C) previously received a Second Written disciplinary action for Safety/Safe Work Practices (b) (6), (b) (7)(C) unsafely climbed in the garden steel) and a First Written disciplinary action for Profanity (b) (6), (b) (7)(C) used profanity and a racial slur in the workplace). [Tab 12.]

In her Charge, (b) (6), (b) (7)(C) does not challenge (b) (6), (b) (7)(C) First Written, Second Written or Third Written disciplinary actions. Nor could (b) (6), (b) (7)(C) challenge those disciplinary actions because they are time-barred under Section 10(b) of the Act.

Because (b) (6), (b) (7)(C) had an active Third Written disciplinary action at the time (b) (6), (b) (7)(C) failed to comply with the Key Controls and Ammunition Sales policies, Walmart discharged (b) (6), (b) (7)(C). [Tab 13.] Management coded (b) (6), (b) (7)(C) discharge as "Misconduct with Coachings," which they generally do when an associate gets discharged after going through all four steps of the progressive discipline process, and which allows the associate to be rehirable.

D. (b) (6), (b) (7)(C) Told (b) (6), (b) (7)(C) That (b) (6), (b) (7)(C) Was Rehirable.

After learning about (b) (6), (b) (7)(C) discharge from (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) immediately met with (b) (6), (b) (7)(C) and asked him if (b) (6), (b) (7)(C) was (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) told (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) recent violations were not considered "gross misconduct" and that (b) (6), (b) (7)(C) was rehirable. (b) (6), (b) (7)(C) explained the process for (b) (6), (b) (7)(C) to reapply and encouraged (b) (6), (b) (7)(C) to do so. (b) (6), (b) (7)(C) said that (b) (6), (b) (7)(C) understood and hoped (b) (6), (b) (7)(C) would bring (b) (6), (b) (7)(C) back if (b) (6), (b) (7)(C) reapplied. (b) (6), (b) (7)(C) also stated that (b) (6), (b) (7)(C) might apply for a (b) (6), (b) (7)(C) nearby (b) (6), (b) (7)(C) home. (b) (6), (b) (7)(C) replied that (b) (6), (b) (7)(C) would give (b) (6), (b) (7)(C) a recommendation if (b) (6), (b) (7)(C) needed one.

Notably, after (b) (6), (b) (7)(C) discharge, and after (b) (6), (b) (7)(C) filed both Charges, (b) (6), (b) (7)(C) came to the store to talk with (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) told (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) had nothing against (b) (6), (b) (7)(C) and thought (b) (6), (b) (7)(C) was great to (b) (6), (b) (7)(C), but that (b) (6), (b) (7)(C) filed the Charges because (b) (6), (b) (7)(C) recently got into a car accident and (b) (6), (b) (7)(C) for DUI, and (b) (6), (b) (7)(C).

E. Walmart Disciplines Associates For Similar Violations Involving Controls, As Well As For Safety/Safe Work Practices, And Profanity.

Management at Store 2418 has disciplined numerous other similarly-situated associates for Key Controls and other Controls violations, as it disciplined (b) (6), (b) (7)(C). [Tab 14.] Store management has also issued numerous disciplinary actions to similarly-situated associates for Safety/Safe Work Practices and Profanity violations. [Tab 15.] Moreover, store management has similarly discharged associates for Misconduct with Coachings after they exhausted all disciplinary action levels of the progressive discipline process. [Tab 16.]

II. LEGAL ANALYSIS.

A. (b) (6), (b) (7)(C) Charge Fails Because (b) (6), (b) (7)(C) Cannot Establish a Prima Facie Case Under Wright Line.

The Board's traditional *Wright Line* analysis applies to (b) (6), (b) (7)(C) 8(a)(1) and 8(a)(3) claim that Walmart retaliated against (b) (6), (b) (7)(C) when it discharged (b) (6), (b) (7)(C) under its progressive discipline process. Under *Wright Line*, (b) (6), (b) (7)(C) must first show: (1) (b) (6), (b) (7)(C) engaged in protected activity; (2) Walmart knew of the protected activity; and (3) Walmart bore animus toward (b) (6), (b) (7)(C) protected activity. *LM Waste Serv. Corp.* 357 NLRB 2234, 2234 (2011). (b) (6), (b) (7)(C) cannot make that showing because Walmart bore no animus towards (b) (6), (b) (7)(C) for (b) (6), (b) (7)(C) speech at Walmart's Shareholders Meeting in (b) (6), (b) (7)(C) 2016.

First, that management at Store 2418 promoted (b) (6), (b) (7)(C) after (b) (6), (b) (7)(C) returned from the Shareholders Meeting, shows that Walmart had no animus towards (b) (6), (b) (7)(C) for (b) (6), (b) (7)(C) speech (or any other union-related

involvement). *UXB Int'l Inc.*, 321 NLRB 446, 449-450 (1996) (no showing of animus where employer promoted employee after involvement in alleged protected activity).

Second, no temporal proximity exists between (b) (6), (b) (7)(C) discharge in (b) (6), (b) (7)(C) 2018 and (b) (6), (b) (7)(C) speech *over two years earlier* in (b) (6), (b) (7)(C) 2016. *Snap-On-Tools, Inc.*, 342 NLRB 5, 9 (2004) (Board held that discipline *two months* after the employee engaged in protected activity *was too remote in time* from the protected activity to show animus that was a motivating factor in the discipline); *see also Southern Mail, Inc.*, 345 NLRB 644, 648-649 (2005) (General Counsel failed to show that union animus constituted a motivating factor in the decision to reduce employee's hours where respondent reduced hours more than five months after the employee's union activity); *Tex-Tan Welhausen Co. Div.*, 159 NLRB 1605, 1605, 1611 (1966) (affirming ALJ's finding of no animus where employer knew for years about employee's union support before taking adverse action against the employee).

Third, at no time during (b) (6), (b) (7)(C) discharge meeting (or during the prior investigation meetings) did management tie (b) (6), (b) (7)(C) discharge to (b) (6), (b) (7)(C) 2016 speech (or any other protected activity). Rather, throughout those meetings with (b) (6), (b) (7)(C), management repeatedly explained that they were investigating and then discharged (b) (6), (b) (7)(C) based solely on (b) (6), (b) (7)(C) violations related to the ammunition and key incidents; management never discussed (b) (6), (b) (7)(C) speech over two years earlier or any other protected activity. *Volt Information Sciences*, 274 NLRB 308, 318-319 (1985) (no showing of animus where no discussion of protected activities occurred when supervisor took employment actions).

Fourth, (b) (6), (b) (7)(C) cannot dispute that Walmart treated (b) (6), (b) (7)(C) similar to other associates who also violated the same policies. *Snap-On-Tools, Inc.*, 342 NLRB 5, 7 (2004) (no animus where no evidence of similarly-situated employees treated more favorably than charging party).

Fifth, Walmart's designation of (b) (6), (b) (7)(C) as eligible for rehire weighs against a finding of animus. *See Sam's Club*, 349 NLRB 1007, 1025 (2007) (employer unlikely to have unlawful intent when it recommends employee for rehire).

B. Walmart Discharged (b) (6), (b) (7)(C) For Legitimate, Non-Discriminatory Reasons, And (b) (6), (b) (7)(C) Cannot Show Pretext.

Even if (b) (6), (b) (7)(C) could establish a *prima facie* case of retaliation (b) (6), (b) (7)(C) cannot), the evidence described above establishes conclusively that Walmart: (1) acted for legitimate, non-discriminatory reasons – (b) (6), (b) (7)(C) failure to follow Walmart's Key Controls and Ammunition Sales Policies (both of which (b) (6), (b) (7)(C) knew were serious violations); (2) treated (b) (6), (b) (7)(C) with restraint and in accordance with the Company's progressive discipline process after numerous reminders and disciplinary actions; (3) acted on (b) (6), (b) (7)(C) repeated violations of Company policies; and (4) would have done so absent any protected activity (*i.e.*, no showing of "pretext" where Walmart treated (b) (6), (b) (7)(C) the same as *numerous* other similarly-situated associates). Notably, none of the job performance issues for which Walmart took employment actions with (b) (6), (b) (7)(C) involved any protected activity.

The Board consistently holds that an employer may discipline employees who violate the employer's policies and fail to perform their jobs. *Neptco, Inc.*, 346 NLRB 18, 18, 27-31 (2005) (employer lawfully discharged employee for work performance); *Palms Hotel & Casino*, 344 NLRB 1363, 1363 (2005) (written warning was lawful because employer showed it would have issued the warning even in the absence of union activity); *Venture Packaging, Inc.*, 290 NLRB 1237, 1240-41